Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1971
No. 71-1062

THE PROCTER & GAMBLE COMPANY,

Petitioner,

vs.

THE PUREX CORPORATION, LTD.,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JULIAN O. VON KALINOWSKI
515 South Flower Street
Los Angeles, California 90071
Attorney for Respondent.

Of Counsel:
ROBERT E. COOPER
JOHN J. SWENSON
GIBSON, DUNN & CRUTCHER
515 South Flower Street
Los Angeles, California 90071

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Respondent, The Purex Corporation, Ltd. (hereinafter "Purex") accepts Petitioner, The Procter & Gamble Company's (hereinafter "P&G") statement of the opinions below and of jurisdiction.

Question Presented.

Whether the judgment and decree of a Court of Appeals affirming and enforcing a decision of the Federal Trade Commission that a defendant violated the antitrust laws of the United States constitutes *prima facie* evidence pursuant to Section 5(a) of the Clayton Act in a subsequent treble damage action.

Statute Involved.

Section 5 of the Clayton Act provides in relevant part:

> "(a) A final judgment or decree heretofore or hereafter rendered in any civil or criminal proceeding brought by or on behalf of the United States under the antitrust laws to the effect that a defendant has violated said laws shall be prima facie evidence against such defendant in any action or proceeding brought by any other party against such defendant under said laws or by the United States under section 15a of this title, as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereof: . . ." 38 Stat. 731 (1914), as amended and codified 15 U.S.C. § 16.

Statement of the Case.

In August, 1957, P&G acquired the Clorox Chemical Company (hereinafter "Clorox"). In September of 1957, the Federal Trade Commission instituted a proceeding against P&G charging that the acquisition was in violation of Section 7 of the Clayton Act (15 U.S.C. § 18). After extensive hearings, the Federal Trade Commission ruled that such acquisition was in violation of Section 7 and ordered divestiture. (*In Re the Procter & Gamble Co.*, 63 F.T.C. 1585 (1963)). The Court of Appeals reversed (358 F.2d 74 (6th Cir. 1966)); and was in turn reversed by this Court which directed that the order of the Commission be affirmed and enforced. (386 U.S. 568 (1967)).

The Petition here arises from a private antitrust action brought by Purex against P&G in which Purex contends that the acquisition of Clorox by P&G and the conduct of the Clorox business during P&G's ownership violated Section 7 of the Clayton Act (15 U.S.C. § 18), and Sections 1 and 2 of the Sherman Act. (15 U.S.C. §§ 1 and 2). As a result of these unlawful acts, Purex contends it has suffered large damages. The complaint alleges that Section 5(a) of the Clayton Act entitles Purex to use the Commission's order, and the judgment of the Supreme Court and Court of Appeals affirming and enforcing the order as *prima facie* evidence of violation of Section 7 of the Clayton Act in this action. P&G sought a ruling in the District Court that the Commission order and the judgment could not be so used, because neither was a "final judgment or decree" within the meaning of Section 5 (a). The District Court denied P&G's motion, and P&G appealed, pursuant to 28 U.S.C. § 1292(b). The Court of Appeals for the Ninth Circuit affirmed, emphasizing that it did not decide the extent to which evidentiary use might be made of the judgment in question. The Circuit left to the trial judge the question of the degree to which the underlying record, made before the Commission, might be referred to, to shed light on the evidentiary effect of the decree. Also left for another day was the question of whether a Commission order, final under the Finality Act of 1959 (15 U.S.C. § 21), but not merged into a decree of judgment of the Court of Appeals, was admissible under Section 5 of the Clayton Act.

REASONS FOR DENYING THE WRIT.

The decision of the Ninth Circuit in this case does not deal with the broad question of whether a Federal Trade Commission order, made final by virtue of the provisions of the Finality Act of 1959, is admissible in a subsequent treble damage suit, pursuant to the provisions of Section 5(a). Thus, the decision is of limited general impact, and is not the question left unsettled in the opinion of this Court in *Minnesota Mining & Mfg. Co. v. New Jersey Wood Finishing Co.*, 381 U.S. 311 (1965) (hereinafter "*3M*"). Here there is a "judgment or decree", as P&G conceded in its memorandum submitted to the District Court.

Moreover, the decision by the Ninth Circuit is fully consistent with the only other Court of Appeals decision that has considered the question since *3M*, *Farmington Dowel Prod. Co. v. Forster Mfg. Co.*, 421 F.2d 61, (1st Cir. 1969). These decisions by no means repudiate settled precedent in the lower courts and, in fact, are fully consistent with the teaching laid down by this Court in *3M*. Any decision contrary to that made by the Ninth Circuit would be irrational and discriminatory in that both the Justice Department and the Commission have co-extensive jurisdiction in many areas. The decision as to which agency pursues a particular antitrust law violator in the first instance is often an arbitrary one, and the availability of the benefit of Section 5(a) to individual plaintiffs would thus turn on the arbitrary decision of which agency instituted proceedings.

The thrust of the legislative history of 5(a) is also consistent with the Ninth Circuit's opinion. The primary goal of the legislators in enacting 5(a) was to pro-

vide assistance to private plaintiffs who have been injured by violations of antitrust laws. The legislators intended to go as far as due process would allow them in effecting that goal.

Finally, no impermissible burden on appeal is created by the decision of the Ninth Circuit. The qualities of administrative determinations easily comport with due process requirements, and there are good and sufficient reasons for allowing an affirmed Commission order to be *prima facie* evidence in a subsequent treble damage action.

1. P&G, in its Petition, states that the "persuasive implication" of this Court's opinion in *3M* is that 5(a) does not include administrative orders (Br. of Appellant, p. 7). P&G aside, commentators have reached a directly contrary conclusion.[1] In addition to the opinion below and the opinion in Farmington, three district courts which have considered the question of the applicability of Section 5(a) to FTC decrees since the Supreme Court's *3M* decision read *3M* as the commentators have, and held that FTC orders are within the terms of Section 5(a).[2]

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[1]". . . the plain implication of . . . [3M] is that FTC orders are admissible as prima facie evidence." Note, 64 Mich. L.Rev. 1160 (1966). "From . . . [3M], *we may conclude with reasonable assurance* that any restraining order which issues from [Commission] . . . proceedings may, under §5(a) be introduced in a subsequent private action against the delinquent party as *prima facie evidence*. . . ." Wilson, *Federal Trade Commission Orders and the Clayton Act §5: A Re-Examination*, 12 Antitrust Bull. 46 (1967) (emphasis supplied); Shores, *Treble Damage Antitrust Suits; Admissibility of Prior Judgments Under Section 5 of the Clayton Act*, 54 Iowa L. Rev. 434, 453 (1968).

[2]*Carpenter v. Central Arkansas Milk Products Ass'n Inc.* (W.D. Ark.), 1966 Trade Cases ¶71,817; *Y & Y Popcorn Supply Co. v. ABC Vending Corp.* (1967 E.D.Pa.), 263 F.Supp. 709, 711; *Farmington Dowel Prods. Co. v. Forster Mfg. Co., Inc.* (D.Me.), 1967 Trade Cases ¶72,262.

The fact that this Court's *3M* decision supports the conclusion that 5(a) applies to FTC decisions is abundantly clear upon analysis of the opinion. First, the decision in *3M* rested primarily on the basis of the well-known Congressional intention to use private damage suits as an aid to enforcement of antitrust laws.

> "Congress has expressed its belief that private antitrust litigation is one of the surest weapons for effective enforcement of the antitrust laws. This construction will lend considerable impetus to that policy.
>
> * * *
>
> In resolving this question we must necessarily rely on the one element of congressional intention which is plain on the record—the clearly expressed desire that private parties be permitted the benefits of prior government actions."
>
> 381 U.S. 311, 318, 320.

The Court in *3M* also noted that:

> "Acceptance of petitioner's position would make enjoyment of these intended benefits [Section 5(b)] turn on the arbitrary allocation of enforcement responsibility between the Department and the Commission, and we must therefore reject it."
>
> 381 U.S. 311, 320.

Second, the same legislative history that P&G urges to defeat application of 5(a) in this action was dealt with in *3M*, when it was held that 5(b) encompassed Commission proceedings. Since, at the time of its passage, Section 5 was one section, and not divided into parts (a) and (b), it is clear that the same considerations were involved.

Third, the Court rejected a narrow, highly technical interpretation of the language of Section 5 (specifically the phrase "civil or criminal proceedings") and interpreted the language more generously in order to fulfill the clearly expressed Congressional purpose of affording private parties maximum benefits from Government antitrust actions. Since the phrase "civil or criminal proceedings" is found in both 5(a) and 5(b), the same Congressional purpose generated both sections. The canon of statutory construction adopted of necessity applies to the language of 5(a) as well as 5(b).

While it is true, as contended by P&G that "the clear teaching of this Court's decision in 3M is that it is not 'the literal wording' of Section 5 'that is controlling,'" (Petitioner's Brief, p. 10), it is also clear that this Court did not mean to imply that a judgment or decree which does fit the literal language of the statute could be eliminated from its purview.

2. Any result other than that reached by the Ninth Circuit would be irrational and discriminatory. Both the Justice Department and the Federal Trade Commission are charged by Congress with enforcement of various portions of the antitrust laws. In many areas the jurisdiction of the Justice Department and of the Federal Trade Commission is coextensive, and both agencies exercise jurisdiction. While the two agencies coordinate their activities so that there is no duplication of efforts, the decision as to which agency pursues any particular antitrust law violator in the first instance often is an arbitrary one. Report of the Attorney General's National Committee to Study the Antitrust Laws, 1965, pp. 374-377.

If Section 5(a) did not encompass Federal Trade Commission decisions, the availability to individual

plaintiffs of the benefit of Section 5(a) would depend on the arbitrary decision of whether the Federal Trade Commission or Justice Department institutes the proceedings against the defendant. The unfairness of such gross inequality of treatment was noted by this Court in *3M*, and constituted one of the reasons underlying the decision of the First Circuit in *Farmington*.

Another compelling reason to accord *prima facie* effect to the findings of the Federal Trade Commission under Section 5(a) is that the Federal Trade Commission proceeding against P&G for its acquisition of Clorox culminated in 6,300 pages of transcript developed over a period of fourteen months in ten different cities (Second Initial Decision of the Hearing Examiner, *The Procter & Gamble Company*, Docket No. 6901, p. 3). From the viewpoint of judicial economy and efficiency, and in light of the objectives of the statute,[3] it is irrational to require plaintiff, in presenting its *prima facie* case to retrace the steps of the Commission to prove that the P&G—Clorox combine violated Section 7. Such duplication of effort would probably consume many months of the trial court's time, would be extremely costly to plaintiff, and would inconvenience many witnesses who have already testified fully.

P&G's argument that the effect on a jury of the prior Federal Trade Commission determination is, for all practical purposes, conclusive, is not well taken. In fact, juries have found for defendants in the face of a prior finding of violation admitted under Section 5(a).

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[3] *International Shoe Mach. Corp. v. United Shoe Mach. Corp.*, 315 F.2d 449, 453 (1st Cir.) *Cert. den.* 375 U.S. 820 (1963); *Bruce's Juices, Inc. v. American Can Co.*, 330 U.S. 743, 751, 67 S.Ct. 1015, 91 L.Ed. 1219 (1947).

Theater Enterprise v. Paramount Film Dist. Corp., 346 U.S. 537, 541 (1954); *Harrison v. Paramount Pictures Inc.* 115 F.Supp. 312 (E.D.Pa. 1953), *affirmed*, 211 F.2d 405 (3rd Cir. 1954). The provision only establishes a rebuttable presumption. It cuts off no defense, interposes no obstacle to a full contestation of all the issues, and takes no question of fact from either court or jury. At most, it is merely a rule of evidence. *Meeker v. Lehigh Valley R. Co.*, 236 U.S. 412, 430 (1915), 59 L.Ed. 644, 657.

3. P&G urges that prior to *3M*, "the established decisional authority had been that Congress did not intend to include administrative actions within Section 5(a)" (Br. of Appellant, p. 6). In support, P&G cites six cases, which upon examination, however reflect either off-hand dicta, or a total dependency on the 1923 opinion in *Proper v. John Bene & Sons*, 295 Fed. 729 (E.D.N.Y. 1923), the rationale of which has been eviscerated by statutory changes and court opinions.

In *United States v. United Shoe Machinery Corp.* 89 F.Supp. 349 (D.C. Mass. 1950), the Court discussed the fact that Commission's cease and desist orders may be as drastic as decrees of district courts, and in that connection, made the off-hand comment that the only point of difference was that the district courts' decrees, unlike the Commission's orders, could be used as *prima facie* evidence in a private treble damage suit. The Court was not actually faced with the question, and volunteered the statement, apparently without the benefit of argument.

The rest of the cases referred to by P&G all rely on *Proper*. In *International Tag and Salesbook Co. v. American Salesbook Co., Inc.*, 1940-1943 Trade Cases,

¶56,267 (S.D.N.Y. 1943), the Court considered pleadings containing allegations of proceedings before the Commission, which had resulted in a consent decree. It is unclear whether or not the consent decree was entered before testimony was taken. The Court merely stated that it doubted whether Federal Trade Commission orders came within Section 5(a), citing *Proper*.

The *Wendel Shoes, Inc. v. Shoenterprise Corp.* (N.Y. Sup.Ct. 1958), 1958 Trade Cases, ¶69,132 opinion consists of one paragraph wherein the Court stated that it felt the Federal Trade Commission was an investigating body as opposed to a judicial tribunal and its order had no binding effect until it was approved by judicial sanctions. The Court simply cited the *Proper* case.

In *Brunswick-Balke-Collender Co. v. American Bowling & Billiard Corp.*, 150 F.2d 69 (2d Cir. 1945), the Second Circuit first decided that a Commission order was admissible on the basis of the Wheeler-Lea amendment to the Federal Trade Commission Act in 1938, which made Commission orders "final". The Court stated that given the legislative changes, the Commission's orders became, for the purposes of Section 5(a), "final judgments and decrees". In fact, however, the amendment of 1938 did not affect the finality of Federal Trade Commission orders enforcing the Clayton Act. It affected the finality only of FTC orders under Section 5 of the Federal Trade Commission Act. Upon rehearing the Court recognized this fact, withdrew its earlier opinion, and held Federal Trade Commission proceedings inadmissible, citing *Proper*. The only difficulty the Second Circuit had with the use of the Federal Trade Commission order as *prima facie* evidence was its lack of "finality". Of course, the

Finality Act of 1959 does today exactly what the *Brunswick* Court first thought the 1938 amendment to the Federal Trade Commission Act did, and in any event, the FTC order against P&G is final by reason of the appeal.

Three opinions are involved in *Highland Supply Corp. v. Reynolds Metals Co.*, 221 F.Supp. 15 (E.D. Mo. 1963), *rev'd on other grounds but aff'd. on issue at bar*, 327 F.2d 725 (8th Cir. 1964), *on remand*, 245 F.Supp. 510 (1965). In the opening case, the District Court faced two questions. First, it had to determine whether or not a Federal Trade Commission proceeding appealed and affirmed by a Court of Appeals tolled the Statute of Limitations. On this point, the Court held that it did not toll the statute on the basis that the Federal Trade Commission proceeding was not a "civil proceeding". The Court also held that appellate review would not toll the Statute of Limitations because it was not instituted by the United States. Of course, both of those conclusions have been changed by the *3M* case. The second question facing the District Court was whether the Court of Appeals' affirmance of Federal Trade Commission order was available to the plaintiff as *prima facie* evidence. On this question, the Court again relied on the now discredited theory that the appeal had been instigated by the defendant. Further, the Court held that the proceeding was not a "civil or criminal proceeding" and therefore could not qualify as *prima facie* evidence. This holding also has been effectively repudiated by the *3M* case, which held the identical words of Section 5(b) included Federal Trade Commission proceedings.

On appeal to the Eighth Circuit, the District Court was reversed on other grounds, but the Court of Ap-

peals apparently approved the District Court's conclusion that Section 5 of the Clayton Act did not apply to Commission orders, merely citing *Proper, Highland Supply Corp. v. Reynolds Metals Co.*, 327 F.2d at 731.

The case was remanded, but in the interim this Court decided the *3M* case. The District Court stated that the Supreme Court opinion in *3M* had not decided the question of whether the Federal Trade Commission orders were admissible under Section 5(a), and did not detract from the Eighth Circuit's opinion that Federal Trade Commission decrees would not be admissible as evidence. On that basis, the Court held the Commission order inadmissible under Section 5(a). This holding is simply inconsistent with the reasons in the Eighth Circuit's prior opinion. The Eighth Circuit's reasons for not permitting Section 5(a) to apply to a Federal Trade Commission proceeding were the same as those regarding 5(b). Therefore, this Court's holding regarding Section 5(b) should have entirely obliterated that rationale for the decision on Section 5(a) in the District Court. Again, it should be remembered that the Eighth Circuit based its opinion on the *Proper* case.

Finally we come to *Proper v. John Bene & Sons*, 295 Fed. 729 (E.D.N.Y. 1923). At the very outset it should be noted that the case involved a Commission investigation of alleged violations of the Federal Trade Commission Act, and the Court held that the Act was not an antitrust law. Thus, only by way of dicta does this opinion provide authority for the other cases cited

by P&G. In the *Proper* case, the Court stated what it felt were the requirements for admissibility of a judgment or decree under Section 5(a):

> "An analysis of section 5 of the Clayton Act, supra, discloses that there are six requirements contained in said section 5 with which compliance must be had in order to make the proceedings competent evidence in this suit: (1) The judgment or decree must be final. (2) It must have been rendered in a criminal prosecution or in a suit or proceeding in equity. (3) The prosecution, suit or proceeding must have been brought by or on behalf of the United States. (4) It must have been instituted under the anti-trust laws. (5) It must be to the effect that a defendant has violated those laws. (6) It shall be prima facie evidence against that defendant."
>
> *Proper. v. John Bene & Sons,* 295 Fed. 729, 731, 732.

As to the requirement number one, the *Proper* Court stated that there had been no final judgment or decree. Elsewhere in the opinion, however, the Court discussed what it felt was required in order that the decree be final. The Court stated:

> "The result of the proceedings before the Commission is an order which has no effect in itself, unless made operative by the Circuit Court of Appeals, which has power of review. The doctrine of res adjudicata has no application unless a final judgment is involved. * * *" 295 Fed. 729.

In other words, it would appear that even the *Proper* Court would have had no objection on this ground to

admitting a decree which had been enforced by an Appellate Court. Also, the Finality Act now has eliminated this objection.

As to requirement number two, the Court doubted whether the proceedings before the Commission were proceedings in equity. However, given the holding of this Court in *3M*, this finding by the *Proper* Court has lost its validity. Question three, regarding whether or not the proceeding was brought by or on behalf of the United States, was answered by the *Proper* Court in the negative. This holding, of course, has been effectively overruled by this Court's decision in *3M*. As to question four raised by the *Proper* Court, it held that the Federal Trade Commission Act was not an antitrust law—an objection which is certainly not applicable to our case which involves the Clayton Act. Similarly, the Court answered the fifth question in the negative, on the basis that there had been no violation of the antitrust laws shown by the Federal Trade Commission, since it had brought its action under the Federal Trade Commission Act.

The *Proper* case and its progeny afford no solace whatsoever to P&G in this action. The bases for *Proper* and the other decisions were entirely undercut by this Court in *3M*, even before the instant decision was rendered.

4. P&G's contention that the legislative history of Section 5(a) discloses an intent to limit its application to judicial determinations is simply not supported by that history. At most the history indicates that Congress did not consider the possibility of allowing private treble damage suitors to utilize Federal Trade Commission orders as *prima facie* evidence under

Section 5(a). On the other hand, the legislative history of the Clayton Act demonstrates unequivocally that the purpose of Congress in passing Section 5(a) was to assure the effectiveness of private treble damage actions as a means of enforcing the antitrust laws, by giving individual plaintiffs the fullest possible benefits from Government actions.

As stated in the committee reports, the "entire provisions is intended to help persons of small means who are injured in their property or business by combinations or corporations violating the antitrust laws."

HR No. 627, 63rd Cong., 2d Sess. 14;

S. Rep. No. 698, 63rd Cong., 2d Sess. 45.

More specifically, Congress' purpose in enacting Section 5(a) was to provide damaged private parties as much assistance as possible from Government suits within the constitutional limitations of due process. This was especially clear in the debates on the version of 5(a) which would have made findings conclusive, against the defendant in a successful Government suit, and against a damaged private party in an unsuccessful Government action. They indicate that, although Congress was using the language relating to courts and one's "day in court", the underlying concern related to the constitutional problem of due process. Since Commission proceedings have long been held to comply with all due process requirements, it would be unreasonable to construe the language of 5(a) narrowly so as to defeat Congress' intent of providing maximum assistance from Government suits consistent with the constitutional limitations of due process.

The applicable principal of statutory construction was stated masterfully by Mr. Justice Holmes, sitting

on circuit in *Johnson v. United States*, 163 Fed. 30, 32 (1st Cir. 1908):

> "A statute may indicate or require as its justification a change in the policy of the law, although it expresses that change only in the specific cases most likely to occur to the mind. The Legislature has the power to decide what the policy of the law shall be, and if it has intimated its will, however indirectly, that will should be recognized and obeyed. The major premise of the conclusion expressed in a statute, the change of policy that induces the enactment, may not be set out in terms, but it is not an adequate discharge of duty for courts to say: We see what you are driving at, but you have not said it, and therefore we shall go on as before."
>
> *Johnson v. United States*, 163 Fed. 30, 32.

This Court in *3M* expressed the same rule of statutory construction as follows:

> "It is true that the precise language of §5(b) does not clearly encompass Commission proceedings. But it is not the literal wording of such a provision that is controlling where, as here, Congress has evidenced neither acceptance nor rejection of either interpretation, yet one effects a clearly expressed congressional purpose while the other defeats it. * * *"
>
> *Minnesota Min. & Mfg. Co. v. N. J. Wood Co.*, 381 U.S. 311, 321 (1965).

Turning to specific examples, it is undisputed that the Congressmen equated a party's "day in court" with due process of law. Representative Prouty of Iowa, in

discussing the proposal to make the unfavorable judgment in a Government suit binding upon a damaged private party, stated:

> "Mr. Chairman, the question here involved is a very simple one, if carefully analyzed. Article V of the amendment to the Constitution which binds the Federal Government expressly provides that no man shall be deprived of life, liberty, or property without due process of law. Every court that has ever passed upon that provision of the Constitution [the due process clause] . . . has held that no one can be deprived of his property unless he has had his day in court. 'Due process of law' has been held again and again to mean that he must have his day in court, by notice and otherwise."
>
> 51 Cong. Rec. (House) 9491 (1914).

Prouty argued that since a private party who had been damaged by a violator of the antitrust laws would not have been a party to the original government proceeding, he could not be bound by the judgment in that action.

The fact that Congress equated the judicial process with the concepts of due process is perhaps best illustrated by a passage from a speech by Representative Green of Iowa:

> "That proposition (no denial of due process) is as old as the law in this country. The provision of the Constitution forbids it is found in the fifth amendment, which provides that no man shall be deprived of his property or rights without due process of law, and yet they seek to provide in this section that he (private treble damage suitor)

shall be deprived of his property without any due process of law, without even notice of hearing or any day in court. So far as that particular matter is concerned there need be no discussion. When it comes to the question of fairness and justice in the matter I think it is fair that the defendant corporation, who has had its day in court, should be estopped, while the third party, who had had no opportunity to be heard, ought not to be estopped or concluded."

51 Cong. Rec. 9491 (1914).

The legislative history shows that Congress intended to afford damaged private parties the right to use the results of Government proceedings against violators of the antitrust laws, subject only to one limitation—that the defendant be accorded due process of law. Since Federal Trade Commission proceedings meet the requirements of due process of law, Section 5(a) should be construed to give effect to the overriding Congressional purpose of maximum possible assistance to injured parties.

5. The argument that Section 5(a) would be unconstitutional if it were interpreted to make admissible the decision of a court reviewing a Federal Trade Commission order but not an unaffirmed order is untenable. First, if, as was held in *Farmington*, the Federal Trade Commission orders and findings covered by the Finality Act are admissible, as *prima facie* evidence, P&G's constitutional argument is moot. However, even if such orders were admissible only when affirmed on appeal, no violation of constitutional rights would result. First, it is questionable whether a general constitutional right to judicial review of administrative adjudications exist.

See 4 Davis, Administrative Law, Section 28.18, pages 93, 94 and Section 28.19, page 106; and *First Nat'l. City Bank of N.Y. v. Gillilland* (D.C. Cir. 1958), 257 F.2d 223, *cert. den.* 358 U.S. 837) holding that the International Claim Settlement Act making decisions of the Foreign Claim Settlement Commission final and unreviewable on all questions of fact and law was not unconstitutional.

Even if there is a constitutional, as opposed to a statutory, right to appeal from Federal Trade Commission divestiture orders, Section 5(a) does not constitute an impermissible burden on that right. Even constitutional rights are not absolute (see the famous dictum of Justice Holmes in *Schenck v. U.S.* (1919), 249 U.S. 47). As this Court recognized in *United States v. Jackson* (1968), 390 U.S. 570, it is only unnecessary burdens which are impermissible. It would by no means be unreasonable for Congress to have allowed *prima facie* effect to an appealed order of the Federal Trade Commission and not to an unappealed one. The appealed order was final, while an unappealed order was not. Also, an appeal certainly gives an additional stamp of correctness which Congress might have desired. In any event, the resulting burden is not unnecessary, in that it is in furtherance of valid Congressional purpose, to afford as many private plaintiffs as possible the benefit of successful Government antitrust actions.

As the Ninth Circuit stated in rejecting the same argument:

> "We find no merit in this argument. When the Clayton Act was adopted, the only enforcible order of the F.T.C. was one embodied in the decree

of a Circuit Court of Appeals. Thus section 5 could only refer to such a decree. We have never heard it suggested that the somewhat similar dilemma in which a defendant or respondent in a court or F.T.C. proceeding to enforce the antitrust laws finds itself by reason of the exclusion from the operation of section 5 of consent judgments or decrees renders the section unconstitutional."

6. The attack on the quality of adjudication of administrative agencies made by P&G overlooks the important fact that the administrative decision in question (and every administrative decision which might become subject to the rule followed by the Ninth Circuit) was reviewed and affirmed by the courts. If, as P&G contends, improper political pressure and ex parte approaches influence Commission decisions, no Commission decision should be accorded any effect—much less *prima facie* effect, since the basic requirements of due process would not have been met. Such improper influence, whether it occurs in an FTC proceeding or a court proceeding, is a matter for a reviewing court on an individual basis.

Certainly criticism of the Federal Trade Commission for not adhering to strict rules of evidence is no argument against giving Commission decisions *prima facie* effect. The Commission's evidentiary rules[4] are designed to achieve the same purpose as court rules, adducing the truth; and in antitrust cases, tried before judges, courts follow much the same rules as the Commission follows, as was emphasized by Judge Wyzanski in *United States v. United Shoe Machinery Corp.*

[4]1949 Rules, 16 CFR §2.1 *et seq.*, especially §2.15(a).

(D.C. Mass. 1950), 89 F.Supp. 349 at 356. See also, *United States v. E.P.I. duPont de Nemours & Co.* (D.Del. 1951), 11 F.R.D. 132, 135. The logical conclusion of P&G's argument is that judgments in court cases tried without juries would be inadmissible under Section 5(a) since they too fail to employ the evidentiary rules P&G would impose as a requirement for according decisions *prima facie* effect.

P&G argues that the Federal Trade Commission is a policy-making body which cannot give unbiased attention to the particular litigants before it. P&G ignores the fact that, insofar as 5(a) is concerned, the Commission is adjudicating actions under the Sherman and Clayton Acts, and therefore necessarily decides cases within the confines of that legislation. In fact, it can be argued that the Commission, because of its expertise, is better qualified to assess whether or not a particular business acquisition may or may not tend to lessen competition—the touch-stone of Section 7 of the Clayton Act.

Conclusion.

The decision by the Ninth Circuit below is not only consistent with the literal requirements of Section 5(a). It is also fully in accord with the rules set forth by this Court in *3M*. The petition for a writ of certiorari should be denied.

Respectfully submitted.

JULIAN O. VON KALINOWSKI
Attorney for Respondent.

Of Counsel:
ROBERT E. COOPER
JOHN J. SWENSON
GIBSON, DUNN & CRUTCHER

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